IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,	§	CIVIL ACTION NO. H-01-3624
	§	AND CONSOLIDATED CASES
Plaintiffs,	§	
	§	
vs.	§	CLASS ACTION
	§	
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants.	§	

REBECCA MARK-JUSBASCHE'S
REPLY MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
John J. McKetta, III
State Bar No. 13711500
Federal ID No. 29895
Attorney in Charge
Helen Currie Foster
State Bar No. 24008379
Federal ID No. 29894
Eric G. Behrens
State Bar No. 02070500
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
(512) 480-5600
(512) 478-1976 Telecopy

ATTORNEYS FOR DEFENDANT REBECCA MARK-JUSBASCHE

JUNE 24, 2002

903

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

REBECCA MARK-JUSBASCHE'S
REPLY MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS

TO THE HONORABLE MELINDA F. HARMON, UNITED STATES DISTRICT JUDGE:

I. INTRODUCTION

Rebecca Mark-Jusbasche ("Mark-Jusbasche") (1) served as a director of Enron for barely over a year, from July 1999 to August 2000; (2) served on no Board committees; (3) was CEO of an Enron subsidiary (Enron International) and then CEO of a publicly held affiliate, Azurix Corp., during a portion of the Class period (from October 1998 until her employment was terminated in August 2000); (4) and never worked with the company again after her service was terminated in August 2000.[1] Plaintiffs come up empty in terms of alleging any misstatement or culpable knowledge or action by her. Mark-Jusbasche is never *mentioned* in connection with the transactions which are the focus of Plaintiffs' claims (including participation in the JEDI, Chewco, LJM1 and LJM2 vehicles), or Broadband, Wholesale, pension matters, or accounting decisions. Most of the key events Plaintiffs point to occurred months and in some cases over a year after she left Enron.

Regardless of the Court's determination of adequacy of pleading against any of the other 78 defendants, the Complaint fails to state any claim against Mark-Jusbasche.

The Complaint only mentions Mark-Jusbasche in 17 of 1,030 paragraphs. Mark-Jusbasche's Memorandum in Support of Motion to Dismiss ("Memorandum") addressed each paragraph, showing that Plaintiffs failed to allege particularized facts giving rise to the required strong inference

---

[1]Newby Consolidated Complaint ("Complaint" or "NCC") at ¶590 (duration of board service), ¶86 (listing Board committees as "None"); ¶591 ("Mark-Jusbasche left the Company" in 2000).

of scienter as to her under § 10(b), and demonstrating that the only § 11 claim pled as to her (on the 7% Notes Offering) should be dismissed.[2]

Plaintiffs' Response[3] tacitly acknowledges the futility of their claims against Mark-Jusbasche by their complete silence on these key arguments in the Memorandum:

Exchange Act: Plaintiffs make no response whatsoever to Mark-Jusbasche's arguments that

(1) the only statements *personally* made by her are non-actionable.[4]

(2) the Complaint fails to point to "any meeting that Mark-Jusbasche attended in which a specific item of adverse information was discussed, to any report from which she could have known of a material misrepresentation or how Plaintiffs know that specific report was conveyed to her, or any other particularized fact that would show scienter as to *her*." Memorandum at 7.

---

[2]Her non-involvement in the core events complained of by Plaintiffs is borne out by the fact that in 1699 pages of briefing by Newby Plaintiffs in response to the Motions to Dismiss filed by the other 78 defendants, her name appears only three times – once where Plaintiffs repeat the conclusory allegation that Enron overpaid for Wessex in order to "create a place" for Mark-Jusbasche (Memorandum of Points and Authorities in Opposition to Motion to Dismiss by Barclays Plc at 29.), and twice in their Opposition to the Motion to Dismiss filed by the Outside Directors (at 33, listing her and others as present at a 10/11/99 Board meeting where the Board waived conflict-of-interest rules, and at 70, listing 3 outside directors and 7 "Enron Insiders" with pre-Class Period sales).

[3]At 55-56, Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss filed by Enron Defendants Buy, Causey, Derrick, Fastow, Frevert, Hannon, Harrison, Hirko, Horton, Kean, Koenig, Lay, Mark-Jusbasche, McMahon, Olson, Pai, Rice, Skilling, Sutton and Whalley (herein **"Response"**).

[4]The Memorandum established that the only statements attributed to Mark-Jusbasche personally (announcing appointments at the newly formed Azurix Corp. and announcing Azurix would pursue international opportunities) cannot form a basis for a PSLRA claim. Memorandum, at 16-19.

(3) the *only specific trade* even mentioned in the Complaint (Plaintiffs' expert termed her March 1999 trade, two and a half years before the negative earnings news of 2001, a "premature option exercise"), is *fully consistent* with Mark-Jusbasche's own "prior trading history." Both before the proposed Class Period, and in the March 1999 sale, she conservatively exercised options well in advance of expiration and when the exercise price was over 50% of the stock price. Memorandum at 29-31.

(4) The Complaint alleges no facts showing any "control person" power on her part, which is fatal to Plaintiffs' §15 and § 20(a) claims. Memorandum at 57-60.

Securities Act: Plaintiffs have now **withdrawn** the sole § 11 claim pled as to Mark-Jusbasche in the Complaint, on the 7% Notes (NCC at ¶1006). Response at n. 47.

Recognizing that the Complaint fails to state a claim against Mark-Jusbasche, Plaintiffs use slightly over one page of their 160-page Response for new and previously unpled allegations against Mark-Jusbasche. As shown below, their impermissible attempt to amend their Complaint via their Response also fails to comply with the PSLRA. Plaintiffs also "group-plead," lumping Mark-Jusbasche with 19 others as "Insiders," and making general and conclusory allegations against "Insiders" unaccompanied by any particularized facts. Plaintiffs also misquote their own purported expert, trying to shore up their insider trading claim. None of this saves their § 10(b), § 20(a) or § 20A claims, because Plaintiffs still fail to allege particularized facts giving rise to a strong inference of scienter as to Mark-Jusbasche.

Since Plaintiffs have **withdrawn** the lone § 11 claim pled against Mark-Jusbasche, the §15 claim also fails. Plaintiffs belatedly assert that Mark-Jusbasche "has liability" for other offerings,

but concede they did not plead any other § 11 claim against her in the Complaint. Response, n. 47. Accordingly, the Court should also dismiss the Securities Act claims against Mark-Jusbasche.

Plaintiffs have also asked for leave to amend as to fraud claims, although without tendering any proposed amended complaint.[5] The futility of any further amendment, as to Mark-Jusbasche, is evident from the fact that Plaintiffs' new and previously unpled allegations in the Response still do not satisfy PSLRA pleading standards. Thus, Mark-Jusbasche asks that the Court dismiss all claims, as to her, with prejudice.

II. PLAINTIFFS' 10(b) CLAIM SHOULD BE DISMISSED AS TO MARK-JUSBASCHE. NEITHER THE COMPLAINT NOR THE "NEW ALLEGATIONS" GIVES RISE TO THE REQUISITE STRONG INFERENCE OF SCIENTER.

A. PLAINTIFFS FAIL TO PLEAD "PRIMARY VIOLATOR" STATUS OR ANY FACTS GIVING RISE TO A STRONG INFERENCE OF SCIENTER AS TO THE TWO PUBLIC FILINGS SIGNED BY MARK-JUSBASCHE.

Mark-Jusbasche is a non-speaker for purposes of the Complaint. None of her own statements are challenged as untrue. Consequently her sales cannot raise any inference. *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 915 (S.D.Tex. 2001). Confronted by this dilemma, Plaintiffs now allege for the first time that Mark-Jusbasche signed two public filings which "she knew to be false." Response at 55-56. We quote below each new "allegation" from Plaintiffs' Response section (at 55-56) purporting to argue that claims as to these two filings against Mark-Jusbasche "are pled with particularity," and demonstrate that each such allegation fails to state any PSLRA claim.

---

[5]Plaintiffs' Opposition to Certain Current and Former Directors' Motion to Dismiss Pursuant to Fed.R.Civ.P. 8 and Request for Leave to Amend. The Request for Leave appears to focus exclusively on fraud. *See*, e.g., 1-2 ("Enron fraud"), 2 ("massive securities scheme"), 3 ("complex securities fraud"), 4 ("securities fraud class action"), 5 ("fraudulent conduct at issue"), 6 ("securities fraud perpetrators such as defendants"), 7 ("Enron fraud is much greater"), 8 ("the Enron fraud"), 9 ("magnitude of the fraud is exacerbated here"), 13 ("massive fraud").

The Response "alleges":	*The Response fails to satisfy the PSLRA:*
"***First,*** Causey, Fastow, Harrison, Lay, Mark-Jusbasche, McMahon, and Skilling all ***signed*** Enron's public filings containing misstatements. *See, e.g.,* ¶¶141, 164, 221, 292, 336, 1006. Consequently, as signers of public disclosures, they 'made' statements within the meaning of 10(b) even if they did not participate in drafting them."[6] [Response at 35.]	Plaintiffs allege no specific false statements, and no facts showing knowledge of falsity by Mark-Jusbasche in the referenced paragraphs and fail to plead scienter as required. *Central Bank*; *Nathenson, BMC*, *Azurix*: ¶141 *does not even mention Mark-Jusbasche* (it discusses the 1998 10-K filed before she was a director). ¶164 alleges Mark-Jusbasche and others signed a 7/23/99 Form S-3 for 10 million exchangeable notes and alleges the incorporated financials (1998 Form 10-K and 2Q99 results) were "false" but not how; it alleges no scienter. ¶221 alleges Mark-Jusbasche and others signed the 1999 10-K but alleges no falsity or scienter. ¶292 discusses the 3/01 2000 10-K *(it does not mention Mark-Jusbasche who had already left the Board).* ¶336 discusses a 7/18/01 S-3 (*it does not mention Mark-Jusbasche who had already left the Board).* ¶1006 is a chart of the § 11 claims (four offerings) – *the only one listing Mark-Jusbasche as a signer has been withdrawn.*

Plaintiffs' claim that as signers, defendants "made statements within the meaning of 10(b), even if they did not participate in drafting them" is classic "group pleading," repeatedly rejected by this Court and the Fifth Circuit. *See, e.g., BMC* at fn. 45 (rejecting as at odds with the PSLRA the "group pleading presumption," under which a "company's statements in prospectuses, registration statements, annual reports, press releases, or other group-published information may be presumed to be the collective work" of individuals with positions in the company).[7]

---

[6]As in Mark-Jusbasche's Memorandum, all emphasis in quotations of the Complaint or Response is as in the original. All other emphases are added, except where otherwise indicated.

[7]As the Fifth Circuit recently stated: "A pleading of scienter may not rest on the inference that defendants must have been aware of the misstatement based on their positions within the company." (continued...)

Certainly Plaintiffs cannot state a § 10(b) claim against Mark-Jusbasche based solely on her signature as director. Merely signing is not enough for a § 10(b) violation – indeed, mere negligence would not be enough. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), cited in *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172, 114 S.Ct. 1439, 1446, 128 L.Ed.2d 119 (1994) ("language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception"). Furthermore, as *Central Bank* established, there is no "aider and abettor" liability under § 10(b); to be liable, a defendant must be a primary violator. The Supreme Court cited strong policy grounds: "'Litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Central Bank* at 1454, quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739, 95 S.Ct. 1917, 1927 (1975). The Supreme Court delineated the scope of 10b-5 liability as follows: any person "who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met." *Id.* (emphasis in original).[8]

Plaintiffs acknowledge that "primary violator" liability attaches under § 10(b) only where a defendant played a "significant role" in preparing any allegedly false or misleading statement

---

[7](...continued)
Abrams v. Baker Hughes Inc., No. 01-20514, slip op. at 10 (5th Cir. May 21, 2002). This Court has held: "Mere conclusory allegations that the defendants, because of their membership and/or their executive and managerial positions with the defendant company, knew or had access to information that was adverse and nonpublic do not plead scienter adequately." *BMC* at 900.

[8]Plaintiffs quote this very language from *Central Bank* in their Response, but omit the crucial last phrase ("assuming *all* of the requirements for primary liability under Rule 10b-5"), perhaps because it conflicts with their attempt to limit the application of *Central Bank*. Response at 73.

actually uttered by another. Response at 78. Yet Plaintiffs do not meet this standard. Plaintiffs allege only that Mark-Jusbasche signed these two public filings, not that she had any role whatsoever in preparing or reviewing them. They not only allege no "significant role" – they allege no role.

Plaintiffs also cite the recent Supreme Court decision in *SEC v. Zandford* for the proposition that a § 10(b) violation does not require a "misrepresentation about the value of a particular security." Response at 74, citing *SEC v. Zandford*, 122 S.Ct. 1899, 2002 WL 1155997, *3. Plaintiffs appear to argue that *Zandford* in some way expands "scheme liability." However, *Zandford* does not change PSLRA jurisprudence, eliminate the scienter requirement, or cure Plaintiffs' failure to allege adequately any § 10(b) violation against Mark-Jusbasche. Plaintiffs fail to point out that *Zandford* is not a PSLRA case. The Supreme Court in no way modified the stringent PSLRA requirement that "in any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78-u-4(b)(2). This Plaintiffs fail to do.

1. PLAINTIFFS FAIL TO ALLEGE ANY FACTS WHICH COULD GIVE RISE TO AN INFERENCE OF SCIENTER ON THE PART OF MARK-JUSBASCHE AS TO ALLEGED "FALSE FINANCIAL STATEMENTS" IN THE 1999 10-K.

Plaintiffs attempt to "amend" the Complaint by new allegations of "knowing false statements":

Plaintiffs allege in their Response:	*The Response fails to satisfy the PSLRA:*
"She made false statements to the market when she signed Enron's Form 99 10-K, filed on 3/31/00, which included false financial statements, ¶¶215-221, and materially false disclosures about Enron's related party transactions, that she knew to be false because she had personally approved waiving Enron's conflict of interest policy to allow CFO Fastow to control LJM2." [Response at 55.]	No such allegation appears in the Complaint. Moreover, Plaintiffs furnish no "particularized facts giving rise to a strong inference of scienter." *Nathenson* at 412. No facts are alleged as to what alleged falsity Mark-Jusbasche learned, or how she learned it, or how Plaintiffs know this. *BMC* at 886. ¶¶215-221 only mention Mark-Jusbasche as signing the Form 10-K in 3/00. NCC ¶221. No allegations of scienter are included.

First, this new allegation is not made anywhere in the Complaint. It is an impermissible attempt to amend the Complaint which should be stricken. *BMC*, 183 F.Supp.2d at 915 ("'[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss,'" quoting *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d 630, 646-48 (S.D.Tex. 2001)).

Even if the Court were to consider this impermissible non-pled allegation, Plaintiffs still fail to allege any facts raising any inference that Mark-Jusbasche *knew* that any aspect of the 1999 10-K was false. The Court will look in vain in the cited paragraphs of the Complaint, ¶¶215-221, for any facts which could give rise to any inference of scienter on the part of Mark-Jusbasche as to "false financial statements" in the 1999 10-K. She is merely included in the list of those signing the Form 10-K in 3/00. NCC at ¶221.

Plaintiffs were required to plead with particularity facts establishing scienter, alleging that Mark-Jusbasche knew the filings were false, how she knew they were false, and how Plaintiffs know of such alleged facts. 15 U.S.C. § 78u-4(b)(2). But Plaintiffs never "specifically plead what [Mark-Jusbasche] learned, when [she] learned it, and how Plaintiffs know what [she] learned." *BMC,* 183 F.Supp.2d at 886; *see also Nathenson v. Zonagen,* 267 F.3d 400, 412 (5th Cir. 2001) ("The effect of

the PSLRA in this respect is to, *at a minimum*, incorporate the standard for pleading fraud under Fed. R. Civ. P. 9(b)."). Thus Plaintiffs' improper attempts to re-plead that Mark-Jusbasche knew of false financial statements in the 1999 10-K – if considered – fail under the PSLRA.

2. THE 1999 FORM 10-K CANNOT GIVE RISE TO SCIENTER ON THE PART OF MARK-JUSBASCHE AS TO FASTOW'S ROLE AS MANAGING MEMBER OF THE GENERAL PARTNER OF LJM2-- PROMPTLY DISCLOSED IN PUBLIC FILINGS.

Plaintiffs further allege, again for the first time and now with new (unpled) exhibits, that Mark-Jusbasche "knew" the 1999 Form 10-K was false because she had, with others, approved a Board resolution authorizing creation of a partnership (LJM2) which Fastow would manage:

Plaintiffs allege in their Response:	*The Response fails to satisfy PSLRA scienter:*
"While Mark-Jusbasche implies that her tenure as a director was short, therefore she did not learn any inside information, this is not borne out by the facts According to documents released by Congress, she attended a crucial meeting in 10/99, at which the board approved the creation of LJM2 and waived Enron's conflict-of-interest policies for Fastow in connection with LJM2. *See* Ex. 24. Those minutes stated that the board passed a resolution authorizing the creation of a partnership (subsequently determined to be LJM2) to be managed by Fastow, which would serve as 'a potential ***ready purchaser of the Company's businesses and assets*** or as a potential contract counterparty [that] could provide [Enron with] liquidity, risk management, and other financial benefits.' Mark-Jusbasche approved the resolution authorizing the partnership, and waiving Enron's conflict of interest policy for Fastow. *Id.* Knowing Fastow controlled LJM2, Mark-Jusbasche still signed and endorsed Enron's false Form 10-K." [Response at 56.]	Everything that Plaintiffs allege Mark-Jusbasche "knew" was promptly disclosed after the Board's action. The ensuing proxy statement filed March 28, 2000, Master SEC Appendix Tab 21, Vol. 2, at 28, specifically identified Fastow as the managing member of LJM2's general partner. The 1999 10-K filed two days later disclosed that the same "senior officer of Enron" was the managing member of LJM's general partner and of LJM2's general partner. Plaintiffs allege no facts showing the Board's approval of the resolution rendered the 1999 10-K false in any way. Plaintiffs allege no facts showing Mark-Jusbasche knew of any alleged falsity about related party transactions or any other matter when she signed the 1999 10-K in 3/00, much less how Plaintiffs know of such knowledge. Plaintiffs allege no culpable action, knowledge, or participation of any sort as to Mark-Jusbasche in connection with LJM2 or any LJM2 transaction.

Plaintiffs cite to Board minutes (unpled, and attached for the first time as an exhibit to their Response) in which the Enron Board is reported to have ratified the Office of the Chairman's determination that participation of Andrew Fastow as managing partner/manager of the proposed partnership would not adversely affect the interests of Enron. Participation in a board waiver, even if there were allegations of negligence or poor judgment, does not state a claim for violation of the Exchange Act without sufficient allegations of knowledge of falsity or intent to deceive. There are none, as to Mark-Jusbasche. *Central Bank, supra*; *Hochfelder, supra.*

Once again, this allegation, made for the first time in Plaintiffs' Response, is impermissible. But even if it had been included in the Complaint it would fail as to Mark-Jusbasche. Plaintiffs never allege any facts showing that approval of this recommendation to the Board rendered the 1999 10-K "false" in any respect. Plaintiffs also never explain, and never allege, any facts which could show that Mark-Jusbasche knew when she signed the 1999 10-K that it was false in any way. They never state what fact she knew that made the 1999 10-K false. Plaintiffs allege nothing as to her.[9] Similarly, Plaintiffs provide no facts as to the conclusory new allegation that Mark-Jusbasche knew of any "materially false disclosures about Enron's related party transactions," whether in the 1999 10-K or elsewhere. Plaintiffs do not specify what "materially false disclosures" are referred to, how the disclosures are false, what knowledge Mark-Jusbasche had of these unspecified falsehoods, or how she is supposed to have known of the alleged falsity. Plaintiffs provide no "particularized facts giving rise to a strong inference of scienter." *Nathenson* at 412.

---

[9]For instance, Plaintiffs allege no facts showing that Mark-Jusbasche knew of information that contradicted material information in public filings. *See, e.g., In re Landry's Seafood Restaurants, Inc.*, Cause No. H-99-1948, slip op. at 64 (viewing as significant "Defendants' admission to having monitored the business continuously and closely on a daily basis from internal spreadsheets and reports from each Landry restaurant").

This new "allegation" ignores the fact that everything Mark-Jusbasche is alleged to have known was promptly disclosed in public filings. Plaintiffs cannot complain of non-disclosure of the Board's October 1999 action, because Fastow's position with LJM2 was promptly disclosed. Plaintiffs allege that LJM2 was created in October 1999.[10] The very next Proxy Statement, publicly filed on March 28, 2000, even before the 1999 Form 10-K, specifically lists Fastow as the managing member of LJM2's general partner. 2000 DEF 14-A Proxy, Master SEC Appendix Tab 21, Vol. 2, at 28.[11] The 1999 10-K of which Plaintiffs now complain (which was filed as of March 30, 2000, after the Proxy Statement had already specifically disclosed and identified Fastow's role with LJM2) discloses that the same "senior officer of Enron" was the managing member of LJM's general partner and of LJM2's general partner. 1999 10-K, Master SEC Appendix Tab 10, Vol. 1, at 101. Plaintiffs do not allege any knowledge by Mark-Jusbasche about LJM2 that was not promptly disclosed publicly. All facts alleged to be known by Mark-Jusbasche were disclosed in SEC filings.

3. PLAINTIFFS' CONCLUSORY GENERAL ALLEGATION OF "INSIDER TRADING" FAILS TO ALLEGE FACTS WHICH COULD GIVE RISE TO ANY INFERENCE OF SCIENTER AS TO MARK-JUSBASCHE OR ANY FAILURE TO DISCLOSE AS TO THE 1999 10-K OR 7/23/99 S-3.

Plaintiffs' final "allegation" in the portion of the Response arguing that claims against Mark-Jusbasche are "pled with particularity" (*see* Response at 56-57) instead provides only a conclusory statement which meets none of the requirements for a § 10(b) insider trading violation:

---

[10]The 1999 10-K recites that LJM2 was actually formed in December 1999, not October 1999. 1999 10-K, Master SEC Appendix Tab 10, Vol. 1, at 101.

[11]The Proxy Statement filed 3/21/00 identified "Andrew S. Fastow, Executive Vice President and Chief Financial Officer of Enron," as the managing member of LJM1's general partner. The Proxy Statement then states, as to LJM2, "Mr. Fastow is the managing member of LJM2's general partner. The general partner of LJM2 is entitled to receive a percentage of the profits of LJM2 in excess of the general partner's proportion of the total capital contributed to LJM2, depending upon the performance of the investments made by LJM2. ..." At 28.

Plaintiffs allege in the Response:	*This conclusory allegation fails to satisfy the PSLRA:*
"Beyond her participation in the fraudulent scheme during the Class Period, while in possession of adverse, material, undisclosed information about the Company, she sold 895,631 shares of Enron stock for $82,536,737 in illegal insider-trading proceeds. ¶83(n)." [Response at 57.]	No facts are pled as to "adverse, material, undisclosed information about the Company," or that Mark-Jusbasche knew it, or when, or how Plaintiffs know such facts. *BMC* at 886. Her alleged "participation in the fraudulent scheme" is never identified or described. Likewise, ¶83(n) recites in conclusory fashion that Mark-Jusbasche traded "while in possession of adverse undisclosed information about the Company" but fails to identify any specific information, when or how she learned it, how Plaintiffs know of this, or any trade allegedly made on such information.

This conclusory statement fails to allege any particularized facts that could support a § 10(b) claim for insider trading, i.e., that a defendant failed with scienter to disclose material nonpublic information before trading on it and making secret profits. *BMC*, 183 F.Supp.2d at 869, n.18. Plaintiffs provide no facts identifying any specific undisclosed information, nor alleging any action or knowledge on the part of Mark-Jusbasche, nor identifying any falsity in the 1999 10-K or 7/23/99 S-3, or any other particularized facts which could give rise to any inference of scienter as to her.

4. PLAINTIFFS NEVER SPECIFY ANY FACTS GIVING RISE ON THE PART OF MARK-JUSBASCHE TO ANY INFERENCE OF SCIENTER WITH RESPECT TO THE 7/23/99 S-3 REGISTRATION.

The case of the missing S-3 furnishes an example of the problems created by Plaintiffs' new group pleading allegations in the Response under the "Insiders" label. At page 35 of their Response, Plaintiffs mention Mark-Jusbasche's signature on the 7/23/99 S-3, and they include the S-3 in the conclusory allegation that defendants "all ***signed*** Enron's public filings containing misstatements." But the S-3 is never mentioned in the Complaint as a basis for any claim against Mark-Jusbasche, and it is not mentioned in the portion of the Response where Plaintiffs try to justify that they have pled with particularity as to Mark-Jusbasche. They confine their arguments of "misstatement" by

her to the 1999 10-K (*see* Response at 55-56), never referencing the S-3. The S-3 is also missing from the argument discussing her trades (*see* Response at 127-128).

In connection with their § 11 claims, however, Plaintiffs continue to allege fraud on the part of those signing the S-3, including (though without any specifics) Mark-Jusbasche. Plaintiffs' technique – mentioning a defendant but failing to provide any particularized fact – not only violates Rule 9(b) and the PSLRA but is misleading, as this example shows:

Plaintiffs allege in the Response:	*Response fails to satisfy PSLRA scienter standards as to the S-3 and violates Rule 9(b):*
"Moreover, Enron board committees had actual notice from the experts that its accounting in core business areas was highly risky and subject to scrutiny or reversal. *See* Exs. 22, 25, 28. Therefore, Mark-Jusbasche and other Enron Insiders who signed the Registration Statements had no reasonable ground to believe the statements were true and they failed to do any reasonable investigation when they were given explicit knowledge of the falsehood. Finally, the Insiders who signed or are otherwise liable under § 11 with respect to Enron's Registration Statements extensively participated in fraudulent transactions misrepresented in and omitted from the Registration Statements, and thus cannot prove that they relied on experts when signing." [Response, at 152.]	The referenced exhibits are minutes of the Audit Committee of which Mark-Jusbasche was not a member. NCC ¶86. No facts are alleged showing Mark-Jusbasche received the "actual notice from the experts" which Plaintiffs allege was given Enron board committees." She is not mentioned in Exs. 22, 25, 28 as attending the Audit Committee meeting. Two of the Audit Committee meetings occurred when she was not even on the *Board.* No facts are alleged showing Mark-Jusbasche had "no reasonable ground to believe the [Registration] statements were true." No facts are alleged showing Mark-Jusbasche was given "explicit knowledge of the [unidentified] falsehood." Plaintiffs violate Rule 9(b) and the PSLRA: they allege "the Insiders" "extensively participated in fraudulent transactions misrepresented in and omitted from the Registration Statements" but provide no specifics as to any "transaction" or "participation" by Mark-Jusbasche.

This allegation is a poster child for the PSLRA. The newly referenced exhibits attached to the Response are minutes of the Audit Committee, of which, as Plaintiffs concede, Mark-Jusbasche

was never a member. NCC at ¶86. (Indeed, two of the three meetings occurred long before, and long after, her brief tenure on the Board. Ex. 22 (2/7/99) and Ex. 28 (2/01).) The claim that "board committees had actual notice" of accounting risks, and that "[t]herefore" Mark-Jusbasche had knowledge of falsehood, is specious and unsupported by any facts; Plaintiffs concede she was on no Board committees. Second, Plaintiffs allege that the "Insiders" who signed "extensively participated in fraudulent transactions misrepresented in and omitted from the Registration Statements." As to this attack, Plaintiffs never specify that Mark-Jusbasche participated in any sort of "fraudulent transaction."

Such "smear tactics" violate Rule 9(b).[12] Plaintiffs' technique also violates the explicit instruction of the PSLRA, reemphasized last month in the *ABC Arbitrage* decision, that securities plaintiffs cannot avoid the requirement to plead facts. Where allegations in the complaint are not based upon plaintiffs' personal knowledge, they are necessarily pleaded on "information and belief," although not labeled as such, and when allegations are based on information and belief, the complaint must set forth a factual basis for such belief. *ABC Arbitrage v. Tchuruk*, No. 01-40645, slip op. at 22-24 and n. 67.[13]

---

[12] The policy basis for Rule 9(b)'s heightened pleading requirements in securities suits, as articulated by the Fifth Circuit, is to provide defendants with fair notice of the plaintiffs' claims, protect defendants from harm to their reputation and goodwill, reduce the number of strike suits, and prevent plaintiffs "from filing baseless claims and then attempting to discover unknown wrongs." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1020 (5th Cir. 1996), quoting *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). Whether or not Plaintiffs have pleaded adequately as to other defendants, they cannot maintain a suit against Mark-Jusbasche without meeting the pleadings requirements as to her. *Collmer v. U.S. Liquids*, 2001 U.S.Dist. LEXIS 23518 (S.D.Tex. Jan. 23, 2001) *99-*101.

[13] *ABC Arbitrage v. Tchuruk*, No. 01-40645, slip op. at 24 (5th Cir. May 13, 2002) explains that in addition to the "'who, what, when, where, and how' required under Rule 9(b) in our securities fraud jurisprudence and under the PSLRA," under 15. U.S.C. §78u-4(b)(1), for allegations made on (continued...)

As to the S-3 Registration Statement of 7/23/99 – Plaintiffs have pled no facts which could give rise to any inference that Mark-Jusbasche knew of any falsity in the S-3, much less that she took any action or "gained anything thereby." Plaintiffs have failed to plead with particularity any § 10(b) claims against her involving the S-3.

B. PLAINTIFFS FAIL TO MEET PSLRA PLEADING STANDARDS AS TO ANY ALLEGED TRADING ON MATERIAL UNDISCLOSED INFORMATION BY MARK-JUSBASCHE.

In another impermissible "amendment" to the Complaint, Plaintiffs attempt to manufacture a § 10(b) violation by alleging for the first time in their Response that Mark-Jusbasche traded on material, undisclosed, adverse information in connection with two issues: their "snowballing" theory about project writedowns at Enron International in 1998, and financing of the purchase of Wessex Water in 1998.[14] As this Court has recognized, to satisfy the manipulation or deception requirement in the insider-trading context, an insider will only be liable under Rule 10b-5 when he or she fails with scienter to disclose material nonpublic information before trading on it and making secret profits. *BMC*, 183 F.Supp.2d at 869, n.18. The Response still fails to identify any facts showing Mark-Jusbasche knew material information that was not disclosed.

---

[13](...continued)
information and belief, the plaintiff must "state with particularity all facts on which that belief is formed, *i.e.*, set forth a factual basis for such belief."

[14]The Complaint alleges in conclusory fashion in ¶83(n) that "During the Class Period, while in possession of adverse undisclosed information about the Company," Mark-Jusbasche sold shares. But ¶83(n) does not specify the "adverse undisclosed information," does not specify that Mark-Jusbasche knew it was "undisclosed," and does not specify when she knew it was undisclosed, how she knew it was undisclosed, when she traded in possession of such knowledge, or how Plaintiffs know of any such matters. In other words, Plaintiffs pled no more than conclusory allegations of insider trading in the Complaint, with no facts giving rise to any inference of scienter.

1. PLAINTIFFS' ALLEGATIONS CONCERNING ENRON INTERNATIONAL, INCLUDING ALLEGED "SNOWBALLING," FAIL TO ALLEGE ANY FACTS GIVING RISE TO ANY INFERENCE OF SCIENTER AS TO MARK-JUSBASCHE OR THAT SHE TRADED ON UNDISCLOSED INFORMATION.

Plaintiffs violate Rule 9(b) and the PSLRA with another set of allegations never pled in the Complaint: that Mark-Jusbasche traded on material inside information relating to Enron International. Again, Plaintiffs fail egregiously to meet PSLRA standards:

Plaintiffs' Response alleges as follows:	*The Response fails to satisfy the PSLRA:*
"Mark-Jusbasche also learned material, adverse, inside information while serving as CEO of Enron International, even though it occurred mainly before the Class Period. The same underlying problems persisted within Enron International throughout the Class Period, thus making certain positive statements – Enron's financial statements – false. ¶155(h), (i), (j). And these facts were never disclosed to the market before Mark-Jusbasche's stock sales or her approval of Enron's 99 10-K. Thus, she traded illegally under § 10(b) and lied to the market." [Response, at 56.]	What "material, adverse, inside information"? Plaintiffs do not specify what Mark-Jusbasche "learned" while "serving as CEO." ¶155 (h), (i) and (j) never mention Mark-Jusbasche at all. Nor do these paragraphs allege any facts showing she "learned material, adverse, inside information." They allege problems with Dabhol and "other Enron International operations" but contain no dates, no dollars, and no details giving rise to any inference of scienter. Plaintiffs never specify what "facts were never disclosed to the market before Mark-Jusbasche's stock sales or her approval of Enron's 99 10-K." Plaintiffs never allege what specific information she knew was not disclosed, or how they know she knew this. Plaintiffs never specify how the 1999 10-K was false or how she "lied to the market."

Plaintiffs do not specify a single specific item of "material, adverse, inside information" which Mark-Jusbasche allegedly learned as CEO of Enron International, much less facts showing how she supposedly learned those facts. Consequently, this allegation fails entirely under the PSLRA. Plaintiffs claim that the "same [unidentified] underlying problems" persisted during the Class Period, making "certain positive statements – Enron's financial statements – false," citing to the Complaint at ¶155 (h), (i), and (j).

However, the cited paragraphs make no reference to Mark-Jusbasche, and allege no facts which would indicate she "learned material, adverse, inside information." Plaintiffs claim "these facts" (unidentified) were not disclosed to the market before Mark-Jusbasche's stock sales or her approval of the 1999 10-K – but, again, even if Plaintiffs had identified such facts, they still have not alleged scienter as to Mark-Jusbasche. Similarly, Plaintiffs claim "these [again, unidentified] facts were never disclosed to the market before Mark-Jusbasche's stock sales or her approval of Enron's 99 10-K." Response at 56. Plaintiffs never identify any specific facts which Mark-Jusbasche *knew* and which were not disclosed to the market, much less *how* she learned of these facts, or how Plaintiffs know of this unidentified and unspecified "material, adverse inside information." *BMC*, 183 F.Supp.2d at 886. As this Court has recognized, Plaintiffs must allege what acts Mark-Jusbasche took "in furtherance of the alleged scheme and specifically plead what [s]he learned, when [s]he learned it, and how Plaintiffs know what [s]he learned." *Id.*

Furthermore, in violation of the PSLRA, Plaintiffs provide absolutely no factual basis for this improper insider-trading allegation, failing to cite a single source. As articulated recently by the Fifth Circuit, in addition to the "who, what, when, where, and how" required for PSLRA pleading, the plaintiff must specify the factual basis for any allegations pled not on personal knowledge but on information and belief. *ABC Arbitrage*, slip op. at 37 (concluding plaintiffs failed to plead with particularity where conclusory allegations, including "defendants' awareness of these facts, are likewise not accompanied by citation to any specific sources").

Plaintiffs also criticize as inadequate Enron's disclosure of the $100 million charge taken for international projects in 11/17/98, in compliance with newly adopted AICPA Statement of Position

98-5. Again, Plaintiffs fail entirely to indicate any fashion in which Enron's disclosure of this $100 million charge renders the 1999 10-K false:

Plaintiffs allege in the Response:	*The Response fails to meet PSLRA standards:*
"She contends that the 11/17/98 Form 10-Q disclosed that Enron would be taking an after-tax charge of $100 million in compliance with newly adopted AICPA Statement of Position 98-5. Mark-Jusbasche Mot. at 10, n.11. This is certainly not dispositive. Rather, this disclosure failed because it never disclosed that the charge was associated with many projects that were no longer viable, and had not been for some time. Because the disclosure was so sparse on details, it did nothing to dispel the notion that the $100 million charge was associated with normal start-up costs in projects, which, going forward, would provide Enron International with a positive revenue stream. In reality, Enron International 'snowballed' start-up costs on projects 'even when it was clear that the project would never go forward.' ¶121(f)." [Response at 56.]	Plaintiffs concede Enron disclosed the $100 million charge but argue it did not disclose it was associated with "many projects that were no longer viable, and had not been for some time." Plaintiffs do not *identify* these projects. Neither here nor in the cited paragraph, ¶121(f), do Plaintiffs allege that *Mark-Jusbasche* knew of any improper failure to write down an international project, knew of any falsity in any public filing including the 1999 10-K, or knew of any undisclosed material information concerning such matters, at any point, or even had responsibility for any such matters.

As to this "snowballing" allegation, Plaintiffs cannot and do not allege violation of GAAP or nondisclosure, conceding that the $100 million charge for writedowns of international projects was actually disclosed in the 11-17-98 10-Q (*see* Memorandum at 10, n.11).[15] Plaintiffs further have no rejoinder to – indeed, do not mention – the fact that after Enron International disclosed the $100 million charge (as well as after the earlier May and August disclosures), Enron stock *rose* slightly.

[15]Furthermore, Enron put the market on notice on May 15, 1998, before the Class Period, that it was evaluating the impact of the April 3, 1998 AICPA issuance of Statement of Position 98-5, which changed the requirement that costs of start-up activities and organization costs be expensed as incurred; Enron made another such disclosure on August 14, 1998. *See* Memorandum at n. 11. Plaintiffs' Response, by its silence on this point, concedes the adequacy of this disclosure.

Id. For fraud-on-the-market cases such as Plaintiffs plead here, this lack of negative impact indicates the information was nonmaterial as a matter of law.[16]

Nevertheless, Plaintiffs claim that the disclosure was "not dispositive" and was "sparse on details" because it did not disclose that the charge was "associated with many projects that were no longer viable." Plaintiffs repeat their allegation that Enron International "snowballed" start-up costs on projects "even when it was clear that the project would never go forward," but Plaintiffs never identify, either in the Response or in the cited paragraph of the Complaint (¶121(f)), one single project as a candidate for this allegation. Such pleading fails to state any PSLRA claim.

Finally, and fundamentally for purposes of this motion to dismiss, Plaintiffs still have never alleged any facts showing that Mark-Jusbasche had any knowledge of "snowballing," any responsibility for accounting decisions relating to project write-downs, or any information showing that any Enron disclosure (including any disclosure in the 1999 10-K) was inadequate, much less false. To satisfy the manipulation or deception requirement in the insider trading context, an insider will only be liable under Rule 10b-5 when he or she fails with scienter to disclose material nonpublic information before trading on it and making secret profits. *BMC*, 183 F.Supp.2d at 869, n.18. As to "snowballing," Plaintiffs allege no facts giving rise to any inference of scienter on the part of

---

[16]The fraud-on-the-market theory pled by Plaintiffs recognizes that in an efficient market for stock, the market price reflects all available, credible information. A plaintiff who relies on the integrity of the stock price also relies on statements made to the market (including fraudulent statements that cause the market to overvalue the stock). However, the reliance presumption can be rebutted by showing that the alleged misrepresentation or omission *did not affect the price of the stock. In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3rd Cir. 1997) ("to the extent that information is not important to reasonable investors, it follows that its release will have a negligible effect on the stock price") (holding that information which had no effect on the stock price was immaterial as a matter of law); *see also Oran v. Stafford*, 226 F.3d 275, 283 (3rd Cir. 2000) (where disclosure had no appreciable negative effect on the company's stock price and in fact rose afterward, price stability was dispositive on the question of materiality).

Mark-Jusbasche which could support a § 10(b) violation in the form of trading on material undisclosed information and making secret profits.

2. PLAINTIFFS FAIL TO STATE ANY 10(b) CLAIM AS TO MARK-JUSBASCHE CONCERNING AZURIX OR ENRON'S FINANCING OF THE WESSEX WATER PURCHASE. ENRON REPEATEDLY DISCLOSED ITS INVESTMENT, AND THE SPECIFIC INFORMATION CITED BY PLAINTIFFS DID NOT EXIST UNTIL A YEAR AFTER MARK-JUSBASCHE LEFT THE BOARD.

Again impermissibly "amending" the Complaint by making new allegations in their Response, Plaintiffs allege for the first time:

Response alleges as follows:	*Response fails to satisfy PSLRA:*
"Mark-Jusbasche also learned of and traded on non-public, material, adverse information in her role as CEO of Azurix. ¶¶590-593."[17]	No such allegation appears in ¶¶590-593. The only mention is that "Mark-Jusbasche was named CEO of Azurix" (¶590) and that "In 00 Mark-Jusbasche left the Company in part due to disappointing financial results at Azurix" (¶591). The Response provides no details on "non-public, material, adverse information" she supposedly "learned," or when, or how, or when she supposedly traded on such information.

The Court will search in vain in ¶¶590-593 for any allegation that Mark-Jusbasche "learned of and traded on non-public, material, adverse information in her role at CEO of Azurix." The sole

[17]Judge Sim Lake dismissed with prejudice PSLRA claims involving alleged misrepresentations in "(1) statements about Azurix's privatization and other business strategies, (2) statements about Azurix's acquisitions...; (3) statements about Azurix's financial condition, including potential earnings; and (4) statements about Azurix's future business prospects." *In re Azurix Corp. Sec. Litig.*, 2002 WL 562819. *See Memorandum*, at 15-16 and n. 21. Plaintiffs fail to respond to Mark-Jusbasche's arguments as to the impact of this opinion on Plaintiffs' § 10(b) claims concerning the creation and operation of Azurix; instead they question its validity on § 11 (Response at 148, on "tracing") and omit it from their Table of Authorities.

references to Mark-Jusbasche in those paragraphs state merely that "Mark-Jusbasche was named CEO of Azurix" (¶590) and that "In 00 Mark-Jusbasche left the Company in part due to disappointing financial results at Azurix" (¶591). The other paragraphs do not even mention Mark-Jusbasche. The Response also omits any facts regarding the "adverse information" supposedly known by her.

Continuing to amend the Complaint impermissibly by new allegations in their Response, Plaintiffs further claim:

The Response alleges as follows:	*The Response fails to meet PSLRA standards:*
"[S]he knew that Atlantic Water Trust was formed in 98 by Enron to purchase part of Azurix, that Atlantic Water Trust was capitalized in part by Marlin Water Trust, which was capitalized by $915 million in debt and $125 million in Equity, and the debt was supported in part by Enron stock. ¶593. **She knew that if the stock price dropped below $34.13 per share, Enron would be in default and obligated to make up the difference, an obligation that was not adequately disclosed.** But she traded her stock while in possession of this material, non-public information anyway. ¶83(n)." [Response at 56-57 (emphasis added).]	**The $34.13 trigger came into existence in July 2001,** a year after Mark-Jusbasche left the Board, and was promptly disclosed **(9-30-01 10-Q).** The company **repeatedly disclosed** an earlier, analogous debt from 1998 on. The cited paragraph (¶593) contains no mention of Mark-Jusbasche. Plaintiffs provide no facts supporting the allegation that she "knew that if the stock price dropped below $34.13 per share, Enron would be in default and obligated to make up the difference, an obligation that was not adequately disclosed." Neither the Complaint nor Response alleges any facts that "she traded her stock while in possession of this material, non-public information," that she knew of this information, or that she knew it was undisclosed. *Central Bank*; *Zandford*; *BMC*. The referenced ¶83(n) alleges in conclusory fashion that Mark-Jusbasche sold shares "while in possession of adverse undisclosed information about the Company" but never identifies the information, the date, whether or when Mark-Jusbasche knew the information was "undisclosed," or any specific trade when she traded in possession of such information.

The Court will look in vain in ¶593, or anywhere in the Complaint, for any allegation that Mark-Jusbasche "knew" that "if the stock price dropped below $34.13, Enron would be in default." Indeed, she could not have known, for this reason: **the stock trigger price of $34.13 did not exist until 2001, after Mark-Jusbasche's August 2000 termination, and after Enron again restructured its financing of the original purchase of the Wessex water utility.** *See* Master SEC Appendix, Tab 64, Vol. 5, at 8, Offering Memorandum dated **July 12, 2001**, for Senior Secured Notes due 2003 issued by Marlin Water Trust II and Marlin Water Capital Corp. II. This debt structure, with its "note trigger event" stock price of $34.13 per share and new maturity date of July 15, 2003 for Enron's underlying Marlin obligation, was disclosed extensively in the 9-30-01 10-Q filed by Enron (*see* Master SEC Appendix, Tab 19, Vol. 2, at 12, 34, and 70).[18]

---

[18]For instance, the 9-30-01 10-Q explains the refinancing of the Marlin obligation, with the new July 15, 2003 maturity date, at 70 (*see also id.* at 12 and 34):

> Atlantic Water Trust is an entity formed by Enron and unrelated institutional investors, investing through an entity named Marlin Water Trust (Marlin), for the purpose of acquiring and holding an interest in Azurix Corp. (Azurix). The primary asset of Azurix is Wessex Water Services Ltd. (Wessex), a regulated water utility in the UK. Atlantic Water Trust currently owns 67% of Azurix, with Enron owning the remaining 33%. Marlin was capitalized with approximately $915 million in debt and $125 million in equity. The Marlin debt is supported by the assets of Atlantic Water Trust and Enron's contingent obligation to cause the sale of Enron equity to retire such obligations. In the event that the sale of equity is not sufficient to retire such obligations, Enron is liable for the shortfall.
>
> Description of Trigger Events. Osprey and Marlin's debt obligations contain certain "Note Trigger Events" to protect the note holders, including (i) an Enron senior unsecured debt rating below investment grade by any of the three major credit rating agencies concurrent with an Enron stock closing price of...$34.13 per share or below in the case of Marlin....

It is frivolous to accuse Mark-Jusbasche, who was terminated in *August 2000*, of trading on "material undisclosed information" involving a stock trigger price of $34.13 which did not even exist until *July 2001*, nearly a year after her departure. Moreover, extensive information about this financing structure was promptly disclosed in the 9-30-01 10-Q, after the July 2001 private offering.

Because Plaintiffs have raised this patently impossible allegation for the first time in their Response, we ask the Court's patience as we set forth on the next 2 ½ pages a detailed review of the adequate disclosures during the time of Mark-Jusbasche's employment with Enron, up through August 2000.

Earlier versions of this debt obligation originating in December 1998, when it bore a 2001 maturity date and a $37.84 stock trigger price, were repeatedly disclosed after Enron bought Wessex Water Plc in 1998[19] and during the time period when Mark-Jusbasche was associated with the company:

- Form S-3/A, filed 2/3/99 (for a combined registration of $1 billion in debt securities, preferred stock, depositary shares and 13.8 million shares of common stock), disclosed the December 1998 refinancing of the financing for the Wessex acquisition by which Enron became a 50% indirect owner of Azurix Corp. Master SEC Appendix Tab 46, Vol. 4 at 18 (duplicated at Tab 47). The Form S-3/A also disclosed that it had designated 204,800 shares

---

[19]Enron announced its cash offer for Wessex in July 1998. NCC at ¶114. Before the Wessex acquisition was restructured in December 1998, in the 9/3/90 Form 10-Q Enron disclosed the acquisitions of Wessex and Elektro, "initially financed by short-term indebtedness and bridge loans totaling approximately $3 billion..." and further disclosed that it intended to create a permanent financing structure resulting in a sale of 50% of each of these two new subsidiaries. Master SEC Appendix Tab 5, Vol. 1, at 8. (2) The 1/22/99 8K set forth in full as Exhibit 4.01 the Statement of Resolutions Establishing a Series of Preferred Stock of Enron Corp., Mandatorily Convertible Single Reset Preferred Stock, Series A (the stock issued to support the obligation entered into in December 1998), and further offered any Enron shareholder a copy of the Remarketing Agreement dated December 17, 1998 among Enron, the Preferred Voting Trust, Marlin Water Trust, Bankers Trust Company as Indenture Trustee, and BT Alex. Brown Incorporated and Donaldson, Lufkin & Jenrette Securities Corporation, as Remarketing Agents. 1999 8-K, at 3. This document is publicly available. http://www.sec.gov/Archives/edgar/data/1024401/0000950129-99-000252.txt.

of Enron preferred stock as the Mandatorily Convertible Single Reset Preferred Stock, Series A, and 83,000 as Series B. *Idi.* at 30. Enron disclosed availability of the forms of resolutions establishing the Enron Mandatorily Convertible Preferred Stock (Series A and B). Enron further disclosed that the shares of both Series A and Series B "were deposited under deposit agreements, and the related depositary shares were then deposited into trusts." The depositary shares "are to be sold by the trusts only if a default occurs under certain of our debt obligations or under certain debt obligations that were incurred in connection with our investment in Wessex Water plc and Elektro-Eletricidade e Servicos S.A....or our credit ratings fall below investment grade and, in the case of Series A, our common stock price falls **below $37.84**, subject to certain adjustments." *Id.* at 36. Enron further disclosed that the "amount payable on these shares in the event of any liquidation, dissolution or winding up of the affairs of Enron is $5,000 per share, together with accrued dividends to the date of payment." *Id.* (The Court may take judicial notice that $5000 x 204,800 = $1,024,000,000.)

- The 1998 10-K filed 3/31/99 disclosed the December 1998 restructuring and that if the stock price or Enron's credit ratings fell, Enron could be liable for the shortfall. Master SEC Appendix Tab 6, Vol. 1. In Note 9, the 10-K disclosed the approximately $2.4 billion purchase price Enron had paid for Wessex in October 1998, and that in the December 1998 restructuring Enron reduced its ownership to 50%:"...In October 1998, Enron, through a wholly-owned subsidiary, acquired Wessex, which provides water supply and wastewater services in Southern England, for approximately $2.4 billion." The 10-K further disclosed that in December 1998, "Enron completed financial restructuring of Enron's ownership interest in Wessex, reducing its interest to 50%. Proceeds of approximately $1.6 billion received from the Elektro and Wessex financial restructurings were used to repay debt incurred in the initial acquisitions. In connection with the financings [of Wessex and Elektro] Enron committed to cause the sale of its convertible preferred stock, with the number of common shares issuable upon conversion determined based on future common stock prices, if certain debt obligations of the related entities acquiring such interests are defaulted upon, or in certain events, including, among other things, Enron's credit ratings falling below specified levels. If the sale of stock is not sufficient to retire such obligations, Enron will be liable for the shortfall. The obligations will mature in December 2000 and 2001 for Elektro and Wessex, respectively. .." Note 9 to the Consolidated Financial Statements disclosed Enron as owning 50% of Azurix, and that its investment in Azurix was $918 million. In the section entitled ""**Results of Operations – Capitalization,**" the 10-K disclosed:"...Enron is a party to certain financial contracts which contain provisions for early settlement on the event of a significant market price decline in which Enron's common stock falls below certain levels (prices ranging from $15 to **$37.84** per share) or if the credit ratings for Enron's unsecured, senior long-term debt obligations fall below investment grade. The impact of this early settlement could include the issuance of additional shares of Enron common stock..." Master SEC Appendix Tab 6, Vol. 1, at 66.

Disclosures similar to those in the 2/03/99 S-3/A were included in subsequent public filings.[20]

- Form 424(b)2, Prospectus, filed 2/11/99, offering 12,000,000 shares of common stock, Master SEC Appendix, Tab 48, Vol. 4, at 31 (again mentioning the $34.84 trigger price).

- Form 424(b)2, Prospectus, filed 5/19/99, offering $500,000,000 of 7.375% notes due 5/15/2019, Master SEC Appendix Tab 49, Vol. 4, at 23 (again mentioning the $34.84 trigger price).

- Form 424(b)3, Prospectus, filed 5-18-00, offering $500,000,000 medium-term notes, Master SEC Appendix Tab 55, Vol. 4, at 50 (referencing the $18.92 trigger price; beginning in 2000 the stock trigger price for the Series A notes was disclosed at **$18.92** per share, not $37.84 per share, reflecting the August 13, 1999 2-for-1 stock split).[21] (*See* Memorandum, n. 45.)

- Form S-3 Registration Statement filed 6/01/00, and S-3 Registration Statement filed 7-19-00, at 52 (Master SEC Appendix Tab 80, Vol. 8, at 17.

Similar disclosures continued after Mark-Jusbasche's August 2000 departure until the July 2001 refinancing of the Wessex obligation. *See* Form S-3 Registration filed 6-1-01, Master SEC Appendix Tab 65, Vol. 6 at 33.

---

[20]Other public filings not included in the Master SEC Appendix continued to disclose the same debt obligation. These public filings could have been included in the Master SEC Appendix had Plaintiffs pled this allegation in the Complaint. To relieve the paper burden on the Court, Mark-Jusbasche is not submitting the additional filings which are duplicative of those shown above and are publicly available from the SEC Edgar website, such as the following:

(1) Form S-3 Reg. Stmt. filed 6/15/00, www.sec.gov.archives/edgar/data/1024401/000095012900003161/0000950129-00-003161-index.htm.

(2) Form S-3, Registration Statement filed 4/5/99, offering 3, 825,921 shares of common stock, www.sec.gov/archives/edgar/data/1024401/0000950129-00-001427.txt.

(3) Form S3-/A Registration Statement filed 7/13/01, www.sec.gov/archives/edgar/data/1024401/000095012901501956/0000950129-01-501956-index.htm

(4) Form S-3 Registration Statement filed 7/19/00, www.sec.gov/archives/edgar/data/1024401/ 000095012900003748/0000950129-00-003748-index.htm.

[21]*See also* the S-1 filed 3/5/99, Offering Memorandum for the Azurix IPO, which further disclosed, *inter alia*, that trigger events could include downgrading of Enron's senior debt to below Baa3 (Moody's), BBB- (Standard & Poor's), or BBB- (Duff & Phelps). Master SEC Appendix Tab 89, Vol. 9, at 78.

Accordingly, Plaintiffs' improper allegation that Mark-Jusbasche "traded" on undisclosed information regarding this debt obligation is flatly wrong. The obligation was disclosed over and over and over again. Furthermore, while the Response says this debt obligation was not "adequately" disclosed, Plaintiffs fail to identify any specific alleged inadequacy of disclosure – much less any *material* inadequacy. Crucially, Plaintiffs fail to supply a single fact showing scienter on the part of Mark-Jusbasche: there is no showing that she knew of any nondisclosure, or even any *inadequate* disclosure, of this information; nor any showing that she knew any material information that was not disclosed.

Finally, Plaintiffs do not specify any specific trade which Mark-Jusbasche allegedly made when this information was allegedly not disclosed. They obviously cannot do so as to the *July 12, 2001* debt obligation described in the Response (long after August 2000 when Mark-Jusbasche's employment was terminated and she left the Board). They obviously cannot as to the earlier debt obligation from the December 1998 restructuring of the Wessex acquisition, which was repeatedly disclosed as described above.[22] Consequently, this improper and totally baseless allegation, newly raised in Plaintiffs' Response (and unpleaded in the Complaint), cannot be any basis to deny Mark-Jusbasche's Motion to Dismiss.

---

[22]Plaintiffs do not allege any 1998 trades by Mark-Jusbasche during December 1998, the month when the initial Wessex acquisition restructuring occurred. Plaintiffs' Exhibit H-1. Plaintiffs do not allege any 1999 trades by her before February 23, 1999. *Id.* By that date, several public filings were on record, including (as one example), the 2/03/99 S-3/A referenced above.

III. PLAINTIFFS' INSIDER TRADING CLAIM FAILS BECAUSE PLAINTIFFS FAIL TO PLEAD A 10(b) VIOLATION AGAINST MARK-JUSBASCHE. MOREOVER, PLAINTIFFS FAIL TO SHOW ANY OF HER TRADES WERE SUSPICIOUS IN TIMING OR AMOUNT.

It is axiomatic that in order to prevail on claims of insider trading, plaintiffs must first adequately allege an underlying § 10(b) violation.[23] Yet as shown above, with respect to alleged misstatements in the 1999 10-K, or the 7/23/99 S-3, or any alleged trading while knowing of material undisclosed information, Plaintiffs fail to allege any facts giving rise to any inference of scienter as to Mark-Jusbasche. The same conclusion applies to the allegations against Mark-Jusbasche as to the insider trading claims in *BMC*: they fail to state a claim for a 10(b) violation.[24]

Furthermore, even if the Court were to consider her trades despite the demonstrated absence of scienter, Plaintiffs also fail to allege any facts showing her trades were in any way unusual or suspicious or out of line with her prior trading. The contrary is true. The Memorandum dispositively demonstrated that the only trade by Mark-Jusbasche during the entire three-year "Class Period" which is identified by Plaintiffs' proposed expert, Dr. Hakala, as a "premature option

---

[23]Liability under § 20A (for violation of "any provision of this chapter or the rules or regulations thereunder," 15 U.S.C. § 78t-1) is predicated on an independent violation of the 1934 Act or rules thereunder. *See In re Advanta Corp. Sec. Litig.*, 180 F.3d at 525, 541 (3d Cir. 1999) (dismissing § 20A claims for failure to plead scienter with requisite particularity under the PSLRA) ("[T]o state a claim under § 20A, a plaintiff must plead a predicate violation of the '34 Act or its rules and regulations."); *Thornton v. Micrografx, Inc.*, 878 F.Supp. 931, 938 (N.D.Tex. 1995) ("Plaintiffs have failed to adequately plead a primary violation under the Exchange Act, and the Court dismisses the insider trading claim as well.").

[24]As phrased in *BMC* at 916, "There is no specific allegation of what nonpublic information was used by Defendants to trade and how they knew such information was material or nonpublic, other than the unacceptable assertion that they knew by virtue of their positions and day-to-day business activities." This Court held that such pleading failed to make out a claim for insider trading: "[A] plaintiff must show that a defendant (1) used material, nonpublic information, (2) knew or recklessly disregarded that the information was material and nonpublic, and (3) traded contemporaneously with the defendant." *Id.*

exercise" (using his definition)[25] is in fact fully consistent with Mark-Jusbasche's pre-Class Period trades. Under applicable law, Plaintiffs must show that Mark-Jusbasche's trades were unusual in timing and amount based on her own prior trading history. Plaintiffs fail to do so.

A. PLAINTIFFS FAIL TO SHOW THAT MARK-JUSBASCHE'S PRE-CLASS PERIOD TRADING DIFFERS FROM THE OPTION EXERCISE WHICH DR. HAKALA TERMS "PREMATURE."

Plaintiffs remain totally silent in the face of public filings showing that the sole option exercise by Mark-Jusbasche which was defined as "premature" in the Hakala Declaration[26] (in March 1999) was in fact completely consistent with the option exercise by Mark-Jusbasche prior to the proposed Class Period. *See* Memorandum at 28-31. Before the Class Period, as well as in the allegedly "premature" March 1999 trade, Mark-Jusbasche was highly conservative: she exercised her option well in advance of expiration, at an exercise price which was more than 50% of the share price. *Id.* In other words, Mark-Jusbasche's own trading pattern, prior to the proposed Class Period, was the same as during the proposed Class Period. Plaintiffs have no response to this showing. They merely repeat in conclusory fashion that "[t]he premature exercise of these options was inconsistent with her general prior trading history" (Response at 127), but never grapple with the details showing that in April 1998, Mark-Jusbasche's option exercise trading pattern was the same as the challenged March 1999 trade. *See* Memorandum at 29.

---

[25]This characterization by Dr. Hakala of the March 1999 trade is the only reference to any specific Mark-Jusbasche trade. The Complaint and Response do not mention any particular trade.

[26]Dr. Hakala defined "premature option exercises" as "where the individuals sacrificed excessive value (exercised stock options more than six months prior to expiration and when the exercise price was greater than 50% of the current stock price of Enron) and behaved inconsistent with the overall tendency of executives within Enron to exercise options." Hakala Decl., ¶25.

Having no response to the facts shown by the publicly filed documents, Plaintiffs now argue that Mark-Jusbasche's trading pattern "is similar to taking an 18% mortgage when the going rate is 8%," and that, "Empirical literature demonstrates that such behavior is simply not a part of sophisticated executives' behavior. Hakala Decl., ¶¶23-24." In fact, as the Court will find on turning to Hakala ¶¶23-24, Plaintiffs' expert says no such thing, either in those paragraphs or elsewhere in the Declaration. Indeed, Dr. Hakala repeatedly admits the general trend of insiders to sell prematurely, for rational reasons. Hakala Decl. ¶¶11, 12, 13. He acknowledges, for instance:

> It is well documented that insiders tend to exercise their stock options prematurely and that these premature exercises of stock options often sacrifice significant future value from the perspective of a risk-neutral investor.

Hakala Decl., ¶12. And he further concedes that literature shows that "insiders will tend to sell after a period when the company's stock price has substantially increased. This finding is consistent with the fact that **insiders are generally risk-averse and will prematurely exercise stock options that are 'deep-in-the-money' and sell the underlying shares at some point for wealth diversification purposes."** Hakala Decl. ¶11 (emphasis added).

Plaintiffs' focus on "irrationality" cannot raise any claim of scienter in the face of facts as to Mark-Jusbasche's own prior trading history. Plaintiffs claim in their Response that Hakala finds that premature option exercises are irrational for executives "when they are inconsistent with prior-observed behavior for that same executive [demonstrably not the case here] or when the premature option exercises sacrifice value well in excess of the sacrifices commonly observed." Response at 111. Plaintiffs cite no case to suggest that the PSLRA permits an inference of scienter when an insider's demonstrated prior trading history does not comport with a purported expert's definition of "premature option exercise." Plaintiffs have implicitly admitted that they cannot meet PSLRA

pleading standards as to Mark-Jusbasche: neither the Complaint, nor the Hakala Declaration, contradicts the publicly disclosed facts that Mark-Jusbasche's pre-Class Period option exercise trading pattern is the same as the allegedly "premature" March 1999 option exercise identified by Hakala.

B. PLAINTIFFS' CONTINUED GROUP PLEADING IN THE RESPONSE VIOLATES PSLRA JURISPRUDENCE AND FAILS TO STATE ANY SECTION 20A CLAIM AS TO MARK-JUSBASCHE.

Plaintiffs claim in "group-plead" fashion that they "demonstrated that all of [defendants'] pre-Class-Period sales were dwarfed by their Class-Period sales, thus highly unusual and suspicious in timing and amount." Response at 114. First, this is the worst sort of tautology, since it is Plaintiffs who control the definition of their proposed Class Period.[27] Second, this is indeed group pleading, because Plaintiffs seek to lump together sales by Mark-Jusbasche with those of all other defendants, while evading the obligation to grapple with the fact that her trades were consistent with her prior trading history.

The proper analysis, as shown above, is whether each defendant's sales during the proposed Class Period are out of line with that defendant's prior trading practices. "Only insider trading in suspicious amounts or at suspicious times is probative of scienter." *Baker Hughes*, slip op. at 15, *citing In re Silicon Graphics,* 183 F.3d at 987 (analyzing each defendant's sales as compared with his prior practice).[28] *See also Collmer v. U.S. Liquids*, 2001 U.S.Dist.LEXIS 23518, *91 (same),

---

[27]By defining a very long class period, as Plaintiffs do here (three years), Plaintiffs can easily manipulate the volume and timing of trades which they characterize as "pre-Class Period," versus those which they characterize as "Class Period," and then claim – again, as they do here – that the "pre-Class Period [lump] sales dwarf the Class Period sales."

[28]As the Ninth Circuit stated in *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th Cir. 2002):

(continued...)

citing with approval the First Circuit's scienter standard for insider trading scienter in *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 197 (1st Cir. 1999), and noting that *Greebel* cautions as follows:

> At a minimum, the trading must be in a context where defendants have incentives to withhold material, non-public information, and it must be unusual, well beyond the normal patterns of trading by those defendants.

Collmer, at *87, quoting *Greebel*, 194 F.3d at 198.[29]

Plaintiffs' claim that the overall number of "pre-Class Period" insider sales is "dwarfed" by sales within the proposed Class Period is not only tautological but fails to account for the fact that the number of Enron stock options grants per year increased **six-fold** between 1995 and 2000 (from 5,924,420 in 1995, to 39,167,000 by 2000--not counting restricted stock awards). Memorandum at 37-38. Indeed, although Dr. Hakala acknowledges that a general pattern of increasing insider selling occurred throughout the nation in the 1990s, when executive compensation changed as a result of increasing compensation from executive stock options, restricted stock grants, and other stock-based compensation, he also fails to account for that annual increase in graphing the insider sales per month in his Exhibit G. Hakala Decl. at ¶9(b); Memorandum at 37-38.

---

[28](...continued)

As we explained in *Silicon Graphics*:

> [I]nsider trading is suspicious only when it is dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed information...Among the relevant factors to consider are: (1) the amount and percentage of shares sold by insiders; (2) the timing of the sales; and (3) whether the sales were consistent with **the insider's prior trading history**. (Emphasis added.)

[29] *See also BMC* at 901 (same, analyzing each defendant's sales in comparison to his prior trading history, and holding "Austin's trading history is too limited to give rise to an inference of intent to defraud," quoting *Silicon Graphics* ["stock sales cannot be viewed as 'unusual' where defendant 'ha[s] no significant trading history for purposes of comparison"]).

In short, Plaintiffs' argument (Response, at 118) that the "group pleading" prohibition does not apply to insider trading analysis seeks to mask their failure to meet PSLRA pleading standards requiring adequate facts to demonstrate that each defendant's trades were "unusual" or "suspicious" when compared with that defendant's pre-Class Period trades. As to Mark-Jusbasche, Plaintiffs fail to make out any claim for insider trading. The § 20A claim should be dismissed.

IV. PLAINTIFFS' SECTION 20(a) CLAIM SHOULD BE DISMISSED SINCE PLAINTIFFS MAKE NO PRETENSE AT ALLEGING "CONTROL PERSON" STATUS AS TO MARK-JUSBASCHE.

Plaintiffs' § 20(a) claim of "controlling person" liability fails as to Mark-Jusbasche and should be dismissed with prejudice. Plaintiffs never respond to her arguments in the Memorandum demonstrating the complete failure to allege "controlling person" facts as to her. No facts are pleaded to show who she had power to control, or how she had such power, prior to Enron's termination of her employment in August 2000. The Response (at 153-4) spends one page on "controlling person" arguments and never mentions Mark-Jusbasche. Plaintiffs acknowledge that the applicable standard requires them to allege "power to control" another person who is liable under § 10(b) – but Plaintiffs fail utterly to meet that standard.

V. PLAINTIFFS' SECTION 11 AND 15 CLAIMS MUST BE DISMISSED. PLAINTIFFS HAVE WITHDRAWN THE ONLY SECTION 11 CLAIM PLED AS TO MARK-JUSBASCHE.

The only § 11 claim pleaded against Mark-Jusbasche in the Complaint dealt with a 7% Exchangeable Notes Offering. In her Memorandum, at pages 40-56, Mark-Jusbasche showed how that claim had no merit. Plaintiffs acknowledge on page 140 of the Response, n. 47, that they "are no longer pursuing their claim with respect to the 7% Exchangeable Notes Offering. Thus, their § 11 claims against Mark-Jusbasche with respect to this offering are moot." On that basis, the § 11 claim should obviously be dismissed.

This was the only § 11 claim pled as to Mark-Jusbasche. NCC at ¶1006. Absent a § 11 claim, the §15 controlling person claim must also be dismissed. Memorandum, at 59-61. Mark-Jusbasche accordingly re-urges the Court to dismiss both claims with prejudice.

Plaintiffs state in puzzling fashion in fn. 47: "However, although not pled in the CC, it should be noted that Mark-Jusbasche signed the post-effective Registration Statement for the 7.375% and 7.875% Notes on 3/01/00 and thus has § 11 liability for those offerings" (emphasis added). Possibly this is a prelude to a Motion to Amend, although Plaintiffs' Response to Certain Defendants' Rule 8 Motion makes no reference to any amendment of the § 11 and § 15 claims, instead focusing solely on "fraud."[30] In any event, as this Court has noted, Plaintiffs cannot "amend" their Complaint by any such statement. *BMC*, 183 F.Supp.2d at 915 ("'[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss,'" quoting *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d 630, 646-48 (S.D.Tex. 2001)).

VI. THE COMPLAINT IS FACIALLY DEFECTIVE UNDER RULE 8, AND SHOULD BE DISMISSED AS TO REBECCA MARK-JUSBASCHE. PLAINTIFFS' REQUEST FOR LEAVE TO FILE STILL ANOTHER VERSION OF THEIR CONSOLIDATED COMPLAINT SHOULD BE DENIED.

In addition to her Rule 12(b)(6) Motion to Dismiss, Mark-Jusbasche joined in the "Motion of Certain Current and Former Directors to Dismiss and Memorandum in Support Pursuant to Fed. R. Civ. P. 8" (the "Rule 8 Motion") has filed in this cause. Rule 8 is an independent basis for dismissing the Complaint.

Plaintiffs do not refute that the Newby Complaint employs *exactly the same structure* that has been dismissed as a "labyrinth," an "abuse," a "puzzle," and an "affront" by the District Court

---

[30]Plaintiffs' "Opposition to Motion of Certain Current and Former Directors To Dismiss Pursuant to Fed. R. Civ. P. 8 and Request for Leave to Amend."

for the Northern District of Texas;[31] by the Ninth Circuit,[32] and by District Courts within the Sixth Circuit,[33] Eleventh Circuit,[34] and within the Ninth Circuit (multiple times).[35] Plaintiffs argue,

---

[31]*Schiller v. Physicians Resource Group, Inc.*, 2002 U.S. Dist. LEXIS 3240 at *16-17 & n. 3 (N. D. Tex. 2002)(describing identical pleading structure as a "labyrinth," and dismissing complaint under PSLRA).

[32]*In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 932 n. 9 (9th Cir. 1996)(Use of "litigation tactic" in the 103-page complaint of repeating allegations and mixing statements, made review "almost impossible" and "affronts Rule 8's mandate"), *affirming dismissal with prejudice*, 855 F.Supp. 1086, 1100 (N.D. Cal. 1994).

[33]*In re Champion Enterprises, Inc. Sec. Litig.*, 144 F.Supp.2d 848, 876 (E.D. Mich. 2001)("An opinion from the Northern District of California [*Wenger*] aptly describes what the plaintiffs did or did not do in the amended complaint," and quoting holding that the complaint violated Rule 8(e) and the PSLRA. The court was inclined to "dismiss with prejudice," but stayed the order pending arguments on a motion to amend).

[34]*In re MCI WorldCom, Inc. Sec. Litig.*, 191 F.Supp.2d 778, 781-82 (S.D. Miss. 2002)(dismissed with prejudice under PSLRA; "However, after a thorough examination, it becomes apparent that the Complaint is a classic example of 'puzzle pleading' and that it does not attain the heightened pleadings requirements for this type case.").

[35]*Copperstone v. TCSI Corp.*, 1999 U.S. Dist. LEXIS 20978, at *15-16 (N.D. Cal. 1999)(dismissing complaint, and describing Plaintiffs' use of 5 sub-periods, Plaintiffs' "lump[ing] together several allegedly misleading statements by the Defendants followed by a list of 'true facts' allegedly known, and Plaintiffs' repetitive laundry list of allegations, which fail "to comply with the presentation requirements of Fed. R. Civ. P. 8 and the Reform Act."); *Chan v. Orthologic Corp.*, 1998 WL 1018624, at *14 n. 11 (D. Ariz. 1998)(dumping lists of "'specific'" reasons into complaint "make[s] a mockery of Rule 9(b) and the Reform Act"); *Wenger v. Lumisys, Inc.*, 2 F.Supp.2d 1231, 1243-44 (N.D. Cal. 1998)(dismissing under both Rule 8 and the PSLRA); *In re Splash Technology Holdings, Inc.*, 160 F.Supp.2d 1059, 1073-75 (N.D. Cal. 2001)(dismissing with prejudice under Rule 8 and PSLRA); *In re Dura Pharmaceuticals, Inc. Sec. Litig.*, 2000 U.S. Dist. LEXIS 15258, at * 20-21 (S.D. Cal. 2000)(dismissing complaint; "As outlined in the above-referenced case law, Plaintiffs cannot simply group together the misrepresentations and then the reasons why they were false or misleading. Rather, Plaintiffs must set forth each allegedly false or misleading statement, then follow each statement with the specific reasons why the statement was false when made."); *In re Oak Technology Sec. Litig.*, 1997 U.S. Dist. LEXIS 18503 at *13-14 (N.D. Cal. 1997)(dismissing complaint; "However, the vast majority of adverse facts pertaining to all of these statements are lumped together in paragraph 73," and finding this "puzzle-style" pleading has been consistently criticized as imposing "unnecessary strain on defendants and the court system"); *May v. Borick*, 1997 U.S. Dist. LEXIS 23474, at *21-23 (C.D. Cal. 1997)(dismissing with prejudice under PSLRA; "The Complaint's organization compounds its Rule 9(b) failings," and fails to address allegedly misleading statements "individually").

instead, that Judge Infante "held" in *In re Rasterops Corp. Sec. Litig.*, 1993 WL 476661 (N.D. Cal. 1993), that a similar complaint complied with Rule 8 and Rule 9(b).[36]

That isn't quite what happened. In *Rasterops*, which was decided prior to enactment of the PSLRA, Magistrate Judge Infante *recommended* to District Judge Whyte that he deny motions to dismiss under Rules 8 and 9(b). Judge Whyte conducted a de novo review, *rejected* the magistrate's Rule 9(b) recommendation, and dismissed the complaint as to all defendants except one for failure to allege sufficient facts. *In re Rasterops Corp. Sec. Litig.*, 1994 WL 374332 at *3 (N.D. Cal. 1994).

While Judge Whyte did not discuss Rule 8 in *Rasterops*, he has made clear that the structure of Plaintiffs' Complaint does not comply with Rule 8, Rule 9(b), nor the PSLRA: he is the author of the *Wenger* decision, where he described the "structural deficiencies" of the complaint as "'maze-like,'" a "'puzzle,'" and as a "'mockery of Rule 9(b) and the Reform Act.'" *Wenger*, 2 F.Supp.2d at 1244. As pointed out in the Rule 8 Motion, Judge Whyte in *Wenger* described precisely the same structure used in the instant Complaint, and wrote:

> The court finds that plaintiff has failed to set forth a 'short and plain statement' of his claims in violation of Rule 8(a) and has failed to make each allegation 'simple, concise and direct' in violation of Rule 8(e). Moreover, in contravention of the Reform Act, plaintiff has failed to craft a Complaint in such a way that a reader can, without undue effort, divine why each alleged statement was false or misleading. Accordingly, this court must dismiss the Complaint for failure to comply with the requirements of Rule 8 **and** the Reform Act, 15 U.S.C. § 78u-4(b)(1).

Id.

---

[36]Plaintiffs' Opposition to Motion of Certain Current and Former Directors to Dismiss Pursuant to Fed. R. Civ. P. 8 and Request for Leave to Amend" (Plaintiffs' "Opposition") at p. 4 (cited again at p. 8). In contrast to the detailed comparisons provided in the Rule 8 Motion, Plaintiffs provide nothing to support that the complaint in *Rasterops* bears any relation to the structure used in their Complaint.

A. THE *STRUCTURE* (NOT MERELY THE LENGTH) OF PLAINTIFFS' PLEADING VIOLATES BOTH RULE 8 AND THE PSLRA. THE LENGTH OF THE COMPLAINT SIMPLY MASKS THE COMPLETE ABSENCE OF PARTICULARITY AS TO MARK-JUSBASCHE.

Plaintiffs attempt to recast the Rule 8 Motion as a simple comment on the 500-page length of the Complaint. They then argue that the PSLRA and Rule 9(b) create a tension against Rule 8's requirement that "[e]ach averment of a pleading shall be simple, concise, and direct."[37]

However, each of the decisions cited above *was* decided in the context of the PSLRA and Rule 9(b).[38] Courts have already found that the extraordinary length of these identically-structured complaints is not due to the plaintiffs' compliance with PSLRA pleading requirements, but instead, the length is designed to *mask* their failure to plead with particularity as to individual defendants.

For example, Plaintiffs argue that their "claims against defendants are plainly spelled out" in the Summary section (¶¶ 5-74) of the Newby Complaint, "which in itself satisfies Rule 8."[39] However, the "Summary" section is a prime example of Plaintiffs' failure to plead in compliance with either Rule 8 or PSLRA: *nowhere in that 45-page Summary section of the Complaint does Mark-Jusbasche's name even appear*. No claim against her is "plainly spelled out" there, or in any of the 17 paragraphs of the Complaint that refer to Mark-Jusbasche. It neither complies with the

---

[37]Plaintiffs' Opposition at p. 6.

[38]Several of these post-PSLRA decisions do rely, in part, on Judge Higginbotham's observation that the "garrulous style" is simply a "mask for an absence of detail. The amended complaint here, although long, states little with particularity." *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 178 (5th Cir. 1997). That applies with particular force to any allegations concerning Mark-Jusbasche.

[39]Plaintiffs' Opposition at p. 4.

particularity requirements of the PSLRA, as to her, nor does it comply with Rule 8's requirement of a simply, concise and direct statement of "[e]ach averment" against her.[40]

The structure of the Complaint (not merely its length) is organized in a way that violates both Rule 8 and Rule 9(b). The Rule 8 Motion meticulously quotes multiple decisions which describe exactly the same pleading structure used in the instant case, and how the structure itself impedes an analysis under the PSLRA. As the Ninth Circuit stated, when it affirmed dismissal of the complaint with prejudice:

> Plaintiffs make this an almost impossible task by repeating general allegations, mixing together allegations about Defendants' statements and analysts' statements, and omitting pertinent parts of the challenged statements. We note that this litigation tactic, which makes it difficult for courts to sort through and determine the merits of a claim, affronts Rule 8's mandate of a 'short and plain statement of the claim.' *See* F.R. Civ. P. 8.

Syntex, 95 F.3d at 932 n. 9.

Rule 9(b) and the PSLRA require that Plaintiffs "'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.'" *BMC*, at 183 F.Supp.2d at 865 n. 14 (quoting *WMX*). As to each such averment against Mark-Jusbasche, Rule 8(e) commands that it shall be "simple, concise, and direct." Plaintiffs have failed to comply with either requirement in their allegations against her.

---

[40]Plaintiffs sprinkle 17 paragraphs that refer to Mark-Jusbasche, intermittently among the 1,030 paragraphs of the Complaint, perhaps hopeful that the Court will lose track of how little is said about her. The *MCI WorldCom* court observed, "On first reading, the instinctive reaction is exactly what is intended by Plaintiffs. The numbers are so large, the stakes were so high, and the fall of the dollar value of WorldCom stock so precipitous, that the reader reacts by thinking that there must have been some corporate misbehavior. However, after a thorough examination, it becomes apparent that the Complaint is a classic example of 'puzzle pleading' and that it does not attain the heightened pleadings requirements for this type case." 191 F.Supp.2d at 781-82.

B. PLAINTIFFS ARGUMENTS REGARDING *LANDRY'S* ARE INAPPOSITE.

Plaintiffs suggest that this Court considered the merits of the same Rule 8 motion in *In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, No. H-99-1948, (S.D. Tex. 2001), and rejected the same argument that Mark-Jusbasche has raised here. Plaintiffs argue that their Complaint is "very similar" and has "almost" the same format as one that this Court found "adequate in most respects."[41] Even with all its tentative and cautious phrasing, Plaintiffs' argument is nevertheless wrong.

Neither the "Landry's Defendants' Motion to Dismiss Plaintiffs' Consolidated Amended Complaint,"[42] nor the "Underwriter Defendants' Motion to Dismiss,"[43] *so much as mentioned Rule 8*, let alone moved for dismissal on that ground. The "Landry's Defendants" submitted a proposed Order which included a reference to Rule 8, but they made no argument or even reference to Rule 8 in a motion. Similarly, the "Plaintiffs' Opposition to the Landry's Defendants' Motion to Dismiss Plaintiffs' Consolidated Amended Complaint" mentioned Rule 8 only once — but only to argue that they are permitted to plead in the alternative under Rule 8(e)(2).[44]

Plaintiffs' reliance on *Rasterops* and *Landry's* is particularly telling. In response to at least a dozen decisions that have found the *structure* of the Complaint to be facially non-compliant with Rule 8, the PSLRA, or both, Plaintiffs respond with i) a Magistrate Judge recommendation, made

---

[41]Plaintiffs' Opposition at p. 4 (bold typeface deleted).

[42]Filed in *In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, No H-99-1948, on Sept. 1, 2000.

[43]Filed in *In re Landry's, supra*, on Sept. 1, 2000.

[44]"Plaintiffs' Opposition to the Landry's Defendants' Motion to Dismiss Plaintiffs' Consolidated Amended Complaint" at p. 32.

prior to enactment of the PSLRA, that was substantially rejected by the same District Judge who later authored *Wenger*; ii) a suit where *neither* set of defendants moved for dismissal on Rule 8 grounds.

Plaintiffs criticize that "Defendants' only *Fifth Circuit* case" is the *WMX* decision, which they note was not governed by the PSLRA. Plaintiffs instead refer this Court to a *1957* decision in *Atwood v. Humble Oil & Refining Co.*, 243 F.2d 885 (5th Cir. 1957).[45] No Fifth Circuit nor District Court has cited *Atwood* since 1959. *Atwood* did not involve securities, let alone the PSLRA. There is nothing to suggest that the structure of complaint in that lawsuit bears any relation to the one that *WMX* and multiple other courts have condemned. And even the *Atwood* court noted, "There may be cases in which mere verbosity or repetition would justify final dismissal by a trial court, but this is not, in our opinion, such a case." 243 F.2d at 889. As *Wenger*, *Copperstone*, *Splash*, *Syntex*, and several other decisions have held, the structure of Plaintiffs' Complaint *is* such a case.

C. PLAINTIFFS' EFFORTS TO DISTINGUISH *COPPERSTONE*, *SPLASH*, *WENGER*, AND OTHER DECISIONS ALSO FAIL.

Plaintiffs argue that "this case cannot be compared to" the dismissals that occurred in three decisions cited by Mark-Jusbasche, *Splash*, *Copperstone*, and *Wenger*. Quotations from those cases, however, show that they are identical to the structure of the Complaint used here. In *Splash*, under the Section titled "False and Misleading Statements During the Class Period,"

> In that section, plaintiffs separate the class period into six general time periods during which they claim defendants made material misrepresentations, and within each of those periods, describe various occasions on which they claim false statements were made, or refer to various documents which they contend contain false statements. [Citation omitted.] Following each of the six groups of allegations of false statements, plaintiffs identify generally those *types* of statements, from the preceding recitation of specific alleged statements, which they contend were false and misleading (without identifying specific paragraph(s) which contain those statements), and then, provide a list of between five and

---

[45]Plaintiffs' Response at p. 6 & n. 6.

> nineteen "reasons" that the statements were false at the time they were made (again, without identifying which alleged false statement(s) are belied by the facts stated in each "reason").

160 F.Supp.2d at 1073 (italics in original). Then,

> the reader then must scan subsections (a) through (m) of paragraph 149 to select those which contain the basis for the claims that the statements are false and misleading.

Id. at 1074. In her Rule 8 Motion, Mark-Jusbasche provides pinpoint cites to exactly the same structure, for each of six time periods, within Plaintiffs' Complaint. The *Copperstone* court's description of the facially-defective complaint in that lawsuit is also identical to this Complaint:

> The Complaint fails to comply with the presentation requirements of Fed. R. Civ. P. 8 and the Reform Act. Plaintiffs separate the class period into five different sub-periods of time. Within each sub-period, Plaintiffs lump together several allegedly misleading statements by the Defendants followed by a list of 'true facts' allegedly known to the Defendants when the statements were made. [Citations omitted.] Many of the allegations are repeated several times without any variation whatsoever. The Complaint does not indicate which among the nearly 40 pages of statements are alleged to be false, and does not follow each allegedly false statement with a factor or factors showing it to be false. ...

The *Wenger* decision also describes the instant Complaint:

> In violation of the Reform Act's requirement that a complaint must specify the reasons why *each* statement is alleged to have been misleading, the Complaint lumps all alleged misrepresentations together in one unwieldy 14-page segment (the statements span eight months, from November 1995 to June 1996) and then follows that catalog with a three-page laundry list of reasons why *all* the statements were allegedly false when made. [Citation omitted.] ... Plaintiff merely throws the statements and the alleged "true facts" together in an undifferentiated clump and apparently expects the reader to sort out and pair each statement with a supposedly relevant "true fact."

2 F.Supp.2d at 1243 (italics in original).

The Complaint *never cites a single false statement that Mark-Jusbasche made.* It does not plead *when* or *how* she knew of any fraudulent activity or otherwise engaged in severe recklessness. Plaintiffs' allegations would be inadequate even to plead a cognizable claim for negligence against her. Rebecca Mark-Jusbasche's Rule 8 Motion should be sustained.

D. PLAINTIFFS' MULTIPLE UNSUCCESSFUL AND HALF-HEARTED ATTEMPTS TO PLEAD FRAUD AGAINST MARK-JUSBASCHE ARE ENOUGH. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE AS TO HER.

Mark-Jusbasche further urges the Court to deny Plaintiffs' motion to file an amendment of their Consolidated Complaint. Plaintiffs suggest that their puzzle-like pleading "'is meant for a child and can be assembled readily.'"[46] Plaintiffs then devote approximately one-third of their Opposition arguing why they should be allowed to cure all of their pleading defects in still another amendment of the Complaint.[47] But as to Mark-Jusbasche, neither in the Consolidated Complaint,[48] nor in their Response, nor in their Opposition, have Plaintiffs succeeded in alleging particularized facts which furnish any basis for claims against her.

VII. CONCLUSION: AS TO MARK-JUSBASCHE, THE COURT SHOULD DISMISS ALL CLAIMS WITH PREJUDICE.

Rebecca Mark-Jusbasche respectfully requests that the Court dismiss all claims, as to her, with prejudice. Plaintiffs have essentially conceded that they cannot state a claim as to her. The Response abandons allegations actually pled in the Complaint, tacitly admitting they failed to state any claim that she personally made any misstatement, committed any culpable act, or knew of and failed to disclose any undisclosed material facts. The Response also fails to even deal with the public filings showing her pre-Class Period trading history is consistent with the only trade identified

---

[46]Plaintiffs' Opposition at p. 2 (quoting *In re Honeywell Int'l Inc. Sec. Litig.*, 182 F.Supp.2d 414, 416 (D. N.J. 2002).

[47]Plaintiffs' Opposition at pp. 3, 13-16.

[48]Nor did the *underlying* complaints allege particularized facts against Mark-Jusbasche which could support claims against her, including the December 4, 2001 Class Action Complaint and the December 12, 2001 Amended Class Action Complaint filed by Amalgamated Bank, further demonstration of Plaintiffs' inability despite multiple opportunities to state a PSLRA claim against Mark-Jusbasche.

by Plaintiffs' expert as a "premature option exercise." Plaintiffs also abandon any pretense in the Response that she was a "controlling person" for any § 10(b) liability. Moreover, Plaintiffs have withdrawn the only § 11 claim pled against Mark-Jusbasche, on the 7% Exchangeable Notes.

Instead, Plaintiffs impermissibly make new allegations never pled in the Complaint concerning a 1999 10-K and a 7/23/99 S-3 signed by Mark-Jusbasche. But Plaintiffs still fail to allege what acts Mark-Jusbasche took "in furtherance of the alleged scheme and specifically plead what [s]he learned, when [s]he learned it, and how Plaintiffs know what [s]he learned." *BMC*, 183 F.Supp.2d at 886. Plaintiffs also impermissibly make new allegations that Mark-Jusbasche traded on material undisclosed information about Enron International but, again, Plaintiffs never identify any specific facts which Mark-Jusbasche *knew* and which were not disclosed to the market, much less *how* she learned of these facts, or how Plaintiffs know of this unidentified and unspecified "material, adverse inside information." *Id.* As to the Wessex financing, Plaintiffs argue she traded on undisclosed information about a July 2001 restructuring – nearly a year after her employment was terminated.

Plaintiffs' Complaint fails to state a claim against Mark-Jusbasche. As to her, it does not comply with the pleading requirements of <u>any</u> of Rule 9, the PSLRA, or Rule 8. As to Mark-Jusbasche, the Complaint should be dismissed with prejudice.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By: _____

John J. McKetta, III
State Bar No. 13711500
Federal ID No. 29895

ATTORNEY IN CHARGE

Helen Currie Foster
State Bar No. 24008379
Federal ID No. 29894
Eric G. Behrens
State Bar No. 02070500
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
(512) 480-5600
(512) 478-1976 Telecopy

ATTORNEYS FOR DEFENDANT REBECCA MARK-JUSBASCHE

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been delivered by e-mail or by facsimile, as set forth in the Order Regarding Service of Papers and Notice of Hearings entered in this cause on April 10, 2002, to all persons on the attached service list attached as Exhibit A hereto, on this the 24th day of June, 2002.

_____
Helen Currie Foster

The Service List

Attached

to this document

may be viewed at

the

Clerk's Office